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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 636

MARVIN E. BRAWNER,
Petitioner,

v.

MATTIE BRAWNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. .....

MARVIN E. BRAWNER,
Petitioner,

v.

MATTIE BRAWNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri.

Marvin E. Brawner respectfully petitions this Honorable Court for a writ of certiorari directed to the Supreme Court of Missouri to review a judgment of said Court entered on September 14, 1959.

OPINION BELOW.

The opinions delivered in the Supreme Court of Missouri are reported in 327 S. W. 2d 808-822 and are appended hereto in Appendix A.

JURISDICTION.

The judgment of the Supreme Court of Missouri sought to be reviewed was dated and entered on September 14, 1959. Motion for rehearing or for modification was ordered stricken on October 12, 1959.

The jurisdiction of this Court is invoked under Section 1257 (3), Title 28, United States Code, which provides for review by writ of certiorari of final judgments or decrees rendered by the highest court of a State in which a decision could be had, where any title, right, or privilege is claimed under the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW.

This is an action by petitioner against his wife to recover damages for bodily injuries proximately caused by her negligence in the operation of her automobile in that she caused it to crush his legs against a house. Under the applicable Missouri statutes, case law, and constitution petitioner has a cause of action and the only appropriate remedy for its enforcement by the State of Missouri is this suit.

I.

The first question presented is whether it is a violation of the due process clause of Section 1 of Amendment 14 to the Constitution of the United States for the State of Missouri to deprive petitioner of any remedy for the enforcement of his cause of action by refusing to allow him to maintain this suit.

II.

The second question presented is whether consistently with the due process clause of Section 1 of Amendment 14

to the Constitution of the United States petitioner may be denied any remedy for the enforcement of his cause of action for the sole reason that maintenance of his suit violates a public policy announced by the Supreme Court of Missouri that is contrary to the appropriate statutory and constitutional provisions of the State of Missouri.

III.

The third question presented is whether it is a violation of the equal protection clause of Section 1 of Amendment 14 to the Constitution of the United States for the State of Missouri to deprive petitioner of any remedy for the enforcement of his cause of action, although it does allow a remedy to others in a similar situation.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes which the case involves are lengthy and their pertinent text is set forth in Appendix B. Their citations are:

Section 1.010, R. S. Mo., page 19, R. S. Mo. Supp. 1957;
Section 1.090, R. S. Mo., page 21, R. S. Mo. Supp. 1957;
Section 451.250, R. S. Mo., page 3446, R. S. Mo. 1949;
Section 451.290, R. S. Mo., page 3447, R. S. Mo. 1949;
Section 537.040, R. S. Mo., page 3908, R. S. Mo. 1949;
Section 14, Article I, Constitution of Missouri (1945), page 42, R. S. Mo. 1949;
Section 1 of Amendment 14 to the Constitution of the United States.

STATEMENT OF THE CASE.

Petitioner filed suit against respondent, his wife, in the Circuit Court of St. Louis County, Missouri, for $30,000.00 damages for bodily injuries on a cause of action for negligence that arose in St. Louis County, Missouri. His first amended petition alleged her specific negligence in the operation of her automobile, including her failure to set the brakes properly when she parked it in a private drive on premises jointly owned by the parties so that it rolled backwards and crushed petitioner's legs against a house. Although it does not appear of record otherwise under the Missouri practice, it is mentioned in the majority opinion of the Supreme Court of Missouri (Tr. pp. 26-27) that the liability of the respondent is insured.

Respondent filed a motion to dismiss the petition upon the grounds, *inter alia*, that she had been married to the petitioner approximately 47 years before and had lived with him as his wife since that time, that the petition charged her with a personal tort, and that under the law of the State of Missouri petitioner, as her husband, had no right to sue for a personal tort. It was stipulated that the parties had been married 47 years before, that they have lived together since that time, and that they are joint owners of property.

The federal questions were first raised at this stage of the proceedings, prior to trial or answer on the merits, by petitioner's Motion to Overrule and Quash Defendant's Motion to Dismiss, which was timely filed in opposition to respondent's motion. Paragraphs 3 and 5 (Tr. pp. 9-10) of petitioner's motion asked that respondent's motion be quashed and overruled on the grounds that for the court to grant respondent's motion and thereby deny petitioner the right to maintain his action would be in violation of Section 1 of Amendment 14 to the Constitution of

the United States in that it would deny him the equal protection of the laws guaranteed by this section and in that it would deprive him of his property in his chose in action against the respondent without due process of law.

The trial court, in the order appealed from, overruled petitioner's motion, sustained respondent's motion on the grounds herein mentioned, and dismissed petitioner's petition with prejudice (Tr. pp. 11).

The federal questions were preserved by respondent in a timely motion for new trial. Paragraph 3 thereof (Tr. pp. 12-13) alleged that the order violated Section 1 of Amendment 14 to the Constitution of the United States in that it deprived petitioner of his property in his chose in action against respondent without due process of law by denying him the right to enforce it. Paragraph 5 thereof (Tr. p. 13) alleged that the order of the court was in violation of Section 1 of Amendment 14 to the Constitution of the United States in that it denied petitioner the equal protection of the laws guaranteed by this Section by denying him the right to enforce his chose in action against the respondent growing out of a violation of his personal rights because of the coverture of the parties.

The trial court overruled petitioner's motion for a new trial (Tr. p. 15).

The federal questions were presented in the language of the motion for new trial to the Supreme Court of Missouri in Appellant's Brief under Points III and V (pages 5 and 8 of Appellant's Brief) and argument thereon (pages 14-18 of Appellant's Brief). (Briefs of counsel are not included in the record proper under the practice of the Supreme Court of Missouri, as petitioner's counsel has been informed by the clerk.)

An appeal was taken to the Supreme Court of Missouri. The case was argued and submitted before Division 2 of

the court, which on its own motion transferred the cause to the court en banc (Tr. p. 17).

After argument and submission the federal questions on both due process and equal protection were specifically ruled adversely to petitioner by the Supreme Court of Missouri en banc by its order affirming the judgment of the trial court (Tr. p. 18). They were discussed in the majority opinion (Tr. pp. 28-29).

The federal questions were further preserved by paragraphs IX and X of petitioner's Motion for Rehearing (Tr. p. 49) and suggestions in support thereof (Tr. pp. 62-64), which was ordered stricken from the record (Tr. p. 65).

ARGUMENT.

I.

It appears to be a well-settled proposition of law that a state may not deprive a person of vested rights in a domestic cause of action by denying him any remedy for its enforcement without violating the rights of that person under the due process clause of Section 1 of Amendment 14 to the Constitution of the United States. Pritchard v. Norton, 106 U. S. 124, 132, 1 S. Ct. 102, 27 L. Ed. 104; Angle v. Chicago, St. Paul, etc., Railway Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. Ed. 55; Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979; Coombs v. Getz, 285 U. S. 434, 442, 448, 52 S. Ct. 435, 76 L. Ed. 866; Alexander v. Alexander, D. C. S. C., 140 F. Supp. 925, reversed on other grounds, 229 F. 2d 111.

Petitioner has found no case in which the Supreme Court of the United States has reviewed the question as to whether there is any exception to this proposition of law because, as in the instant case, the parties are husband and wife.

The decisions of the Supreme Court of Missouri have established the proposition that there is a cause of action for personal torts committed by one spouse against the other. The most recent case, Ennis v. Trubitt, Mo. Sup., 306 S. W. 2d 549, decided while the appeal in this case was being taken, held that a wife had a cause of action that she could maintain under a survival statute against the estate of her deceased husband.

The decision in this case has not altered that rule of law, but the Court has refused to allow petitioner a forum for the enforcement of his cause of action. It suggests instead that he seek legislative redress.

Petitioner's position is that the right to seek legislative redress alone is not sufficient under the due process clause.

One very practical effect of decisions such as this one furnishes a strong reason why certiorari should be granted. This situation is illustrated by the case of Bodenhagen v. Bodenhagen (1958), 5 Wis. 2d 306, 92 N. W. 2d 759. It ruled in effect that the Wisconsin courts were open to suits between spouses based on Illinois law (see Brandt v. Keller, 413 Ill. 503, 109 N. E. 2d 729), even though the Illinois legislature had denied a forum for personal torts committed during coverture. If states are to be permitted under the 14th Amendment to deny forums to litigants in cases in which there is a cause of action under their substantive law, the result may be undesirable forum shopping which may well reach into federal courts under diversity jurisdiction.

A state has no authority to deny either civil or criminal justice.

II.

The majority opinion states that there is statutory authority for the maintenance of this suit (Tr. p. 21). These statutes are "permissive" as to the plaintiff's choice, but confer no option on the courts. And of course the open court provision of the Constitution of Missouri (Section 14, Article 1) would seem to be controlling as to what the public policy of Missouri should be, even though petitioner did not adequately raise the direct state constitutional issue. This case is one of first impression in Missouri as to the right of a husband to sue his wife for personal tort.

Petitioner took the position in this case, contrary to what is stated by the Court, that it is a moot question as to whether or not a suit for personal tort between husband and wife could be maintained at common law, since the

first case arose in England in 1876 (Phillips v. Barnett, 1 Q. B. D. 436). Section 4.010 adopted the common law as of 1607. At any rate any such common law rule would have been clearly modified by subsequent statutes and court decisions allowing actions. See Hawkinson v. Johnson, 122 F. 2d 724 (8th Cir. 1941), certiorari denied, 314 U. S. 694, 86 L. Ed. 559, 62 S. Ct. 365 (1941).

Ordinarily due process is not concerned with which particular agency of the state government takes the action complained of. But in this particular instance the Supreme Court of Missouri, without any authority excepting its own, has refused to allow a hearing on the merits until the General Assembly of Missouri passes a "black horse" statute.

Its refusal to allow the action to be heard is not based on a decision that such actions should not be allowed. It does so because it feels that in the general area there are legislative considerations involving the interests of persons and insurance companies not parties in name or in fact to this simple law suit. No move has been made for the inclusion of any parties or the filing of a brief as amicus curiae. The particular insurance company involved did not write any provision in its policy excluding these actions and was ably represented in fact by respondent's attorneys.

The court justifies its decision as an exercise of the police power. The argument would be more persuasive if the cause of action were abolished, as Connecticut abolished guest actions. See Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed 221. The authority of the Court to take such action should be subject to independent review by the Supreme Court of the United States.

Due process would not be satisfied by an act of the legislature decreeing an otherwise proper result in a judicial

case after a hearing before a legislative committee. This would be true even though the same legislature might set up a quasi judicial tribunal that could validly perform the function after proper hearing and procedures.

Due process would not be satisfied if a police sergeant heard all interested parties and their attorneys and decreed an otherwise proper result.

And due process is not satisfied in this case by the action of the Supreme Court of Missouri in denying a rightful cause of action for the reason that it feels that the General Assembly of Missouri may not have given the matter full consideration.

III.

The majority refers to its allowance of actions in two recent cases as " . . . special circumstances . . ." It does not disapprove of any former decisions. It also is clear that it is making no distinction on the basis of which spouse brings the suit. This is confirmed by the case of Deatherage v. Deatherage, decided on the authority of the Brawner case on November 9, 1959 (Appendix C).

In considering the equal protection question a brief analysis of the Brawner case and some of the cases allowing actions may be in order. Petitioner feels that it is not necessary to analyze other cases not allowing actions. No constitutional issue has been raised in any Missouri case except this one.

There are five salient elements of the Brawner case that should be considered. This case seeks (1) direct maintenance, (2) during marriage, (3) of a cause of action for personal tort, (4) of negligence, (5) that arose during marriage.

Combinations of all these elements have been included in cases that have been permitted and are permitted under Missouri law.

Ennis v. Truhitt, Mo. Sup., 1957, 306 S. W. 2d 549, permitted the maintenance of a suit that included elements 1, 3, 4, and 5, but in which the suit was maintained after the husband's death against his estate.

Hamilton v. Fulkerson, Mo. Sup., 1955, 285 S. W. 2d 642, permitted the maintenance of a suit that contained elements 1, 2, 3, and 4, but was a suit for a pre-marital tort.

Since the decision in the leading case of Rice, Stix & Co. v. Sally, 1903, 176 Mo. 107, 75 S. W. 398, actions for other than personal torts, but containing elements 1, 2, and 5 have been commonplace in Missouri.

Elements 2, 3, 4, and 5 were contained in the action in Mullally v. Langenberg Bros. Grain Co., 1936, 339 Mo. 582, 98 S. W. 2d 645, which in effect ruled that a wife might sue her husband's employer under **respondeat superior**, even though such employer might eventually shift the burden of his loss to the husband. The Ennis case also permitted a count for gross and reckless conduct, etc., and Shewalter v. Wood, Mo. App., 1916, 183 S. W. 1127, indicates approval of an action for intentional conversion of property.

Petitioner feels that there is an intrinsic logical incompatibility between any rule of spousal disability to sue and the philosophy of the common law under modern written constitutions. Slaves did not have a right to sue in court. 20 C. J. S. Slaves, Section 7.

There is no statutory or constitutional authority whatsoever for denying this action or for denying some actions and allowing others. But the Supreme Court of Missouri has attempted to make a classification that the legislature did not make, sometimes following the statutes, which allow actions without exception, and sometimes creating exceptions that were not written in the statutes. The re

suit has been a series of decisions that are arbitrary and discriminatory and that follows no ordered plan. The equal protection clause gives an added protection to petitioner in this case. Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

Judgment of the Circuit Court:

"Plaintiff's motion to dismiss and quash defendant's motion to dismiss overruled. Defendant's motion to dismiss plaintiff's cause of action sustained on grounds 2, 4, and 5 of defendant's said motion to dismiss.

"Plaintiff's petition dismissed with prejudice. Costs against plaintiff."

"Fred E. Mueller, Judge."

(Filed—April 22, 1957.)

Judgment of the Supreme Court of Missouri:

And thereafter, and on the 14th day of September, 1959, the following further proceedings were had in said cause, to-wit:

Marvin E. Brawner, Appellant,

46319 vs.

Mattie Brawner, Respondent,

Appeal from the Circuit Court of St. Louis County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover, against the said appellant her costs and charges herein expended and have therefor execution (Opinions filed).

Which said opinions are in words and figures following:

In the Supreme Court of Missouri
En Banc

Marvin E. Brawner, Appellant,

v.

Mattie Brawner, Respondent.

No. 46,319

Appeal From the Circuit Court of St. Louis County

Honorable Fred E. Mueller, Judge.

This is an action by a husband against his wife to recover damages in the sum of $30,000 for personal injuries alleged to have been caused by the negligence of the wife in the operation of her automobile. The trial court dismissed plaintiff's petition holding that the plaintiff husband could not maintain an action against his wife for a personal tort. The plaintiff has appealed.

The parties are and were at the time of the alleged injuries husband and wife, having been married for more than forty-seven years. The negligence charged is that the defendant failed to set the brakes properly when she parked her automobile on a private drive of the premises owned jointly by the parties, thereby permitting the automobile to roll backwards and strike and injure the plaintiff. The question presented is whether a husband can maintain a civil action for damages against his wife for personal injuries resulting from negligent acts committed by the wife during the marriage.

It is recognized by the parties that at common law neither the husband nor the wife could maintain a civil action against the other for a personal tort. Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382, and Willott v. Willott, 333 Mo. 896, 62 S. W. 2d 1084, 89 A. L. R. 114, are the

leading cases construing the Married Women's Act of 1889 and holding that it did not have the effect of permitting a wife to maintain a civil action against her husband for a personal tort. The first case was an action for false imprisonment and the latter was based on the negligent operation of an automobile. The plaintiff states that it may not be necessary to overrule Rogers and Willott in order to permit the maintenance of this action because there is stronger authority both statutory and judicial for the husband's right to sue. However, the plaintiff urges that Rogers and Willott should be overruled if necessary to permit the maintenance of the action and that to do otherwise would violate plaintiff's rights under the Constitution of Missouri and the Constitution of the United States.

The statutes upon which the plaintiff mainly relies are, §§451.250, 451.290, 507.010 and 537.040, R. S. Mo., 1949, V. A. M. S. As we view the legal problem presented, it is unnecessary to construe again or discuss at length the effect of the Married Women's Act. The reason is that it was the wife and not the husband that was **under coverture** at common law.

Coverture is a term used to describe the condition or state of a married woman whereby the civil existence of the wife was for many purposes merged with that of her husband. Bouvier's Law Dictionary. In Osborn v. Horine, 19 Ill. 424, 125, the Supreme Court of Illinois described coverture as follows: "The very term **coverture** implies that she is, during its continuance, under the protection of her husband, and the common law will not allow her to do anything which may prejudice her rights or interests, without his advice, consent and approval." The general purpose of the Married Women's Act and related statutes was to relieve the wife from this condition of civil dependency and disability, and to free the husband from liability for his wife's torts.

In this case we are not concerned with the right of a married woman to maintain an action but with her liability and legal capacity to be sued by her husband in a negligence action. If public policy does not prohibit such a suit, authority to maintain it is clearly permitted by § 537.040 without resort to the derivative sections of the Married Women's Act to which reference has been made. Section 537.040 provides: "For all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefor, except in cases where, under the law, he would be jointly responsible with her, if the marriage did not exist." If this section does not create, it at least recognizes the liability of a married woman for her torts; it also absolves the husband of responsibility for the wife's torts based on the marriage relation alone. State ex rel. McCrory v. Bland, 355 Mo. 706, 197 S. W. 2d 669, 168 A. L. R. 929.

In the present state of the law, one spouse is not permitted to maintain this type of action against the other because of the common-law rule of immunity. Section 1.010, R. S. Mo., 1949. This is true notwithstanding the recent cases of Hamilton v. Fulkerson, Mo., 285 S. W. 2d 642, and Ennis v. Truhitte, Mo., 306 S. W. 2d 549, in which cases it was held that the rule did not apply because of the special circumstances of those cases. The Married Women's Act has been construed on several occasions as not authorizing actions for personal torts between spouses. It has not been demonstrated that this Court is in a better position to interpret the legislative intent of these statutes than the courts that decided the Rogers case in 1915 and the Willott case in 1933. It may well be that this court would reach a different conclusion, if it were construing similar statutes enacted in a modern day setting; but we are not at liberty to say that these prior decisions do not correctly interpret the legislative intent of 1889. We next

take up the plaintiff's contention that this court should declare that the public policy of the state no longer supports the rule, thereby disapproving and overruling Rogers, Willott, and similar cases.

The plaintiff urges that the judgment of dismissal is contrary to the public policy of the state as expressed in the Motor Vehicle Responsibility Law, Ch. 303, R. S. Mo., 1949. He contends the fact that the law contains no exclusion for actions between spouses is indicative of a legislative trend and of a changed public policy. This contention overlooks the nature of the law. Its purpose is to provide greater assurance that liabilities arising out of the ownership, maintenance or use, of motor vehicles will be discharged. It does not purport to create any new liability and does not affect the policy here involved.

While a precise definition of the term public policy presents difficulty, it is generally said to be that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good; it is synonymous with "the policy of the law" and "the public good". Dille v. St. Luke's Hospital, 355 Mo. 436, 196 S. W. 2d 615, 620 (2). The definition and effect of the term is also extensively considered and discussed in In re Rahn's Estate, 316 Mo. 492, 291 S. W. 120, 122, 51 A. L. R. 877, cert. den. 274 U. S. 745, 47 S. Ct. 591, 71 L. Ed. 1325.

Both statutes and judicial decisions have a bearing in ascertaining the public policy of a state, but statutes are the very highest evidence of public policy and binding on the courts. Reed v. Jackson County, 346 Mo. 720, 142 S. W. 2d 862, 865 (1), cert. den. Jackson Co. v. Reed, 311 U. S. 716, 61 S. Ct. 397, 85 L. Ed. 466; State ex inf. Dalton v. Miles Laboratories, Inc., 365 Mo. 350, 282 S. W. 2d 564, 574 (15); State ex rel. Spink v. Kemp, 365 Mo. 368, 283 S. W. 2d 502, 529 (40). The general assembly has legis-

lated extensively with regard to marriage, the marital relation, and family rights and responsibilities. It has removed a number of common-law disabilities such as incompetency of a husband or wife to testify in a criminal or a civil case to which the other is a party although the statute in each instance preserves the privilege of their confidential communications. Sections 491.020 and 546.260. While the legislature has been active in the general field of marital relations, it has not seen fit to change the construction of the Married Women's Act made by the Rogers and Willott decisions and the matrimonial immunity declared by those cases and referred to in Rice v. Gray, 225 Mo. App. 890, 34 S. W. 2d 567.

Where the general assembly has changed one aspect of a common-law rule, the courts have generally refrained from undertaking any modification of the remainder of the rule. See Cummings v. Illinois Central R. Co., 364 Mo. 868, 269 S. W. 2d 111, 121, 47 A. L. R. 2d 513, wherein this court stated: "Thus, the legislature has seen fit to change the common law rule in one respect. In our view, if any other changes are to be effected—if dying declarations are to be made admissible in criminal cases other than homicide and abortion (and similar) cases, or in certain types of civil cases or in civil cases generally—such changes should be made by the legislature, the law-enacting branch of government, rather than by the judiciary, the law-interpreting branch." See also State v. Dunbar, 360 Mo. 788, 230 S. W. 2d 845, 848-849.

The proper ambit of the court's authority on an issue of this kind is both important and difficult to delineate. Mr. Benjamin N. Cardozo, a judge of the highest appellate court of New York State and later a justice of the Supreme Court of the United States, is recognized as one of the great students and authorities on the development and function of the common law. In his treatise on The Nature of The Judicial Process, Judge Cardozo made these

observations concerning the role of the judge as a legislator: "We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance" p. 103. "Each [the judge and the legislator] indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law." p. 113. "* * * the power to declare the law carries with it the power, and within limits the duty, to make law when none exists. * * *." p. 124. "Judges have, of course, the power—though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law." p. 129. "* * * there are jural principals which limit the freedom of the judge. * * *." p. 130. "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence" p. 141.

Obviously, the general assembly is not only better equipped than this court to investigate and develop the facts pertinent to a determination of this phase of public policy but also has greater authority to deal with the particular problem and at the same time the related ones. The problem with which we are concerned is not an isolated one. It touches on many subjects with which the legislature has dealt, such as the privileged communications of married persons; a husband's liability for his wife's support which includes medical expenses, and children's rights of inheritance from their parents. Also, the insurance business is affected with a public interest, is

subject to the control of the state's police power and has been extensively regulated. State ex inf. McKittrick v. Koon, 356 Mo. 284, 201 S. W. 2d 446; Barker v. Leggett, Mo., 295 S. W. 2d 836.

Assuming, however, that this court is free to declare the public policy and change the rule in this kind of case, the persuasive effect of the action of other jurisdictions and related decisions of this state should be considered. Without undertaking to discuss in detail the holdings in other states, they may be summarized by means of the annotation in 43 A. L. R. 2d 632, published in 1955. It appears that twenty-nine states, including Missouri, adhere to the common-law rule of marital immunity. In addition, such actions are not permitted in the District of Columbia, Canada or England. On the other hand, the annotation lists twelve states as following the minority rule, permitting either spouse to sue the other for a personal tort. In two other states, Arizona and Ohio, the decisions are rather inconclusive but they appear to follow the minority rule. It appears that two other states, North Carolina and Wisconsin, have by statute authorized the maintenance of a personal injury action by one spouse against the other.

In 1953 the Illinois legislature amended its statute to provide that "neither husband nor wife may sue the other for a tort to the person committed during coverture." Laws of Illinois, 1953, p. 437, § 1; Smith-Hurd Illinois Statutes, Ch. 68, § 1. In 1937 when § 57 of New York's Domestic Relation Law was changed to permit a suit by a husband or wife against the other for personal injuries, a companion statute was enacted which provides: "No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision re-

lating specifically thereto is included in the policy." Consolidated Laws of New York, Insurance Law, § 167 (3).

Legal writers have generally favored some change in the common-law rule, although they are not in complete agreement as to the extent and nature of the modification. Professor William E. McCurdy in his treatise on Torts Between Persons in Domestic Relation, 43 Harvard Law Review, 1030, 1050, discusses the considerations influencing the Courts for recognition or denial of the right of spouses to sue each other for personal torts and suggests five possible solutions ranging from permitting no civil action to permitting all actions between spouses as though they were strangers sole and unmarried. He prefers a plan imposing a number of substantive limitations upon such actions because of the relation of the parties. In discussing the possible disruption of home life and danger of domestic collusion, Professor McCurdy stated (p. 1053): "In all these things we are in the realm of vague public policy, dangerous for courts to invade, equipped as they are with only the weapon of a priori reasoning." Among the text writers on the subject are Prosser on Torts, § 101, pp. 670, 673, and 1 Harper and James, The Law of Torts, § 8.10, p. 643. It is argued by some that liability insurance coverage in such cases is an effective insulation against a defendant spouse being unhappy about being sued; while others say that insurance coverage would tend to induce collusive claims since both spouses would stand to benefit by the recovery which would be morally offensive. Some think that accident insurance coverage would be preferable to liability insurance. While the protection is limited to pecuniary losses, it covers all accidental injuries including those resulting from automobile accidents, is not dependent upon human fault and does not put the marital couple in an adversary position as a prerequisite for recovery.

Just recently this court recognized the continued existence of the rule that an unemancipated minor cannot sue

a parent to recover damages for personal injuries alleged to have been caused by the negligent operation of an automobile. Wurth v. Wurth, Mo., 322 S. W. 2d 745. This immunity from suit is based upon the same sort of public policy considerations as in the case at bar. Baker v. Baker, 364 Mo. 453, 263 S. W. 2d 29. Also in the Baker case, as in the case at bar, the liability of the defendant was insured. This court has also adhered to the rule of immunity of charitable institutions for tort liability, Krenger v. Schumacher, 364 Mo. 568, 264 S. W. 2d 311; Dille v. St. Luke's Hospital, 355 Mo. 436, 196 S. W. 2d 615, and of municipalities while operating a hospital as a governmental function, Schroeder v. City of St. Louis, 360 Mo. 293, 228 S. W. 2d 677.

The common-law rule of spousal immunity from suit for a personal tort has been in existence during the entire period of Missouri statehood. It affects more than private rights, 26 Am. Jur. 633, Husband and Wife, § 4, and should not be lightly disturbed. The appellant urges that the rule is so "out of step with modern conditions" that it should be abrogated by the court. We refrain from doing so. If the public interest requires a change, we believe, for the reasons stated, that it should be made by the general assembly. On the present record it has not been demonstrated that the court should act.

In his Divisional Reply and Supplemental Brief, the plaintiff presented for the first time his contention that the common-law rule of marital immunity violates § 14, Art. I, Constitution of Missouri, 1945, in that a "certain remedy" is not afforded for the injury sued on. This constitutional question was not presented to the trial court nor was it preserved in plaintiff's motion for new trial as required by § 512.161 (1) and S. Ct. Rule 3.23. The plaintiff, however, seeks to have the contention decided by invoking S. Ct. Rule 3.27. Certainly this is not a **plain** error in the sense that it is manifest and clear. See Elkins-Swyers Oil

Equipment Co. v. Monteau Co., 357 Mo. 448, 209 S. W. 2d 127, 130 (2); Quinn v. Buchanan, Mo., 298 S. W. 2d 413, 417 (5), and 11 Am. Jur. 1124-1126, Constitutional Law § 326. It is not within the purview of the rule designed to prevent the occurrence of a manifest injustice. Critcher v. Rudy Fick, Inc., Mo., 315 S. W. 2d 421; Johnson v. Foote, Mo., 308 S. W. 2d 662; In re Peterson's Estate, Mo., 295 S. W. 2d 144. This will further appear from the consideration of other constitutional questions properly raised.

The plaintiff also asserts that the judgment of dismissal was in violation of § 10, Art. I, Constitution of Missouri, and § 1 of Amendment 14 of the Constitution of the United States, in that he was denied the right to enforce his chose in action thereby depriving him of his property without due process of law. The essence of plaintiff's contention is that the due process limitation prevents the state from imposing any restriction based on marital status upon litigation between spouses. This would necessarily mean that statutory as well as common-law restrictions are prohibited. The defendant says there can be no constitutional questions because the common-law rule of immunity existed prior to the adoption of the constitutional provisions. We believe, however, the issues should be decided on broader grounds.

In the reasonable exercise of its police power, a state may regulate the effect of marriage upon the property rights of the parties as well as the qualification of the contracting parties, the formalities necessary for its creation, the duties and obligations incident to the marriage relation, and the grounds for its dissolution. 55 C. J. S. 809, Marriage, § 2; 35 Am. Jur. 187, Marriage, § 12.

Matrimonial status is still a matter of public concern; the state has a direct interest and is in effect a third party to every marriage contract. Parks v. Marshall, 322 Mo. 218, 14 S. W. 2d 590, 595 (7), 62 A. L. R. 835; Wagoner v. Wagoner, 287 Mo. 567, 229 S. W. 1064, 1070 (5).

The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a state may lawfully be exerted. Belberive Investment Co. v. Kansas City, 321 Mo. 969, 13 S. W. 2d 628, 634 (1); Valley Spring Hog Ranch Co. v. Plagmann, 282 Mo. 1, 220 S. W. 4, 5 (10), 15 A. L. R. 266.

A regulation that is fairly referable to the police power of the state in that it is designed to protect the health, safety, peace, comfort and general welfare, does not infringe upon constitutional guaranties of personal rights and due process unless the regulation passes the bounds of reason and assumes the character of arbitrary power. Belberive Investment Co. v. Kansas City, supra, 13 S. W. 2d 634 (2).

The plaintiff also asserts that the dismissal of his petition was in violation of Sec. 2, Art. I, Constitution of Missouri, and Sec. 1 of Amendment 14 of the Constitution of the United States in that he was denied the right to enforce his chose in action "because of the coverture of the parties" thereby depriving him of equal rights and opportunity under the law and equal protection of the laws. The plaintiff does not demonstrate any unconstitutional inequality and we have discovered none.

The equal protection clauses of the state and federal constitutions do not prohibit classification of the subjects of legislation and the constitutional provisions are sufficiently complied with if all within the same class are included and treated alike. Hanley et al. v. Kansas City, 201 Mo. 182, 173 S. W. 2d 70, 72 (1); Ballentine v. Nester, 330 Mo. 58, 164 S. W. 2d 378, 383 (17).

Many statutory and common-law obligations and privileges not equally distributed between husband and wife

such as the obligation of family support imposed on the husband, are undoubtedly valid. The wisdom and policy of the statute abolishing curtesy which created an inequality between husbands and wives and discriminated against the husband's rights was held to be a matter for legislative determination that could not be considered by the courts. O'Brien v. Sedalia Trust Co., 319 Mo. 1001, 5 S. W. 2d 74, 76 77. The claims of unconstitutionality are denied.

The trial court's ruling was not erroneous and accordingly the judgment is affirmed.

Clem F. Storckman, Judge.

All concur except Hollingsworth, C. J., who dissents in separate opinion filed.

In the
Supreme Court of Missouri,
En Banc,

April Session, 1959.

Marvin E. Brawner,
Appellant,
vs.
Mattie Brawner,
Respondent.
No. 46,319

Dissenting Opinion.

I must respectfully dissent from the opinion adopted in this case by the Court En Banc. My reasons for so doing are well stated in an opinion submitted in Division Two by Stockard, C., which, omitting the first and last paragraphs thereof, I, with his consent, adopt as my dissenting opinion. It follows:

It is undisputed that at common law neither spouse could maintain an action against the other for a tort committed during coverture. Rogers v. Rogers, 168 Mo. App. 177, S. W. 382, 383; Willott v. Willott, 333 Mo. 806, 62 S. W. 2d 1084, 89 A. L. R. 114; 41 C. J. S., Husband and Wife, 396; Harper & James, Torts, 1559. Therefore, if the plaintiff in this case is entitled to maintain this action against his wife, it must be because the common law rule has been appropriately changed by statute, or it has been changed by statute, or because it should be or has been changed by this court in the exercise of its inherent power to modify ancient and outmoded rules of the common law, by reason of changed social conditions. See State v. Kollenborn, Mo. Sup., 304 S. W. 2d 855.

The common law rule that neither spouse could sue the other was based primarily upon the historical legal fiction of unity of husband and wife with the accompanying conclusion that a person could not sue himself, but the courts particularly subsequent to the adoption of what is known as the married women's acts, have frequently seized upon the inability of one spouse to sue the other as a possible policy conducive of promote marital harmony and domestic peace and felicity. 41 C. J. S., Husband and Wife, 396; Patenaude v. Patenaude, 195 Minn. 522, 263 N. W. 546; Correa v. Correa, Fla., 47 So. 2d 774; Annotation, 4 A. L. R. 2d 652, 661-662. The universal adoption by the various states of the married women's acts relieved wives from many of the common law disabilities, and it was readily recognized that the Missouri act had the effect of emancipating a married woman by endowing her with ability to sue and be sued, to manage her own property, and to have the earnings of her own labor." Clayton v. Poole, Mo. Sup., 197 S. W. 340, L. R. A. 1918A, 532. While the courts of the various states are fairly uniform in the interpretation of these acts insofar as they pertain to property interests of a married woman, there is a wide

divergence of opinion, even when the language of the statutes is substantially the same, as to whether they authorize a married woman to sue her husband or to be sued by him for what is referred to as a personal tort.

The terminology of the married women's acts varies widely between the states. Some expressly prohibit actions for personal torts between husband and wife. See Chap. 68, § 1, Ill. Ann. Stat. Others provide that no action between spouses for personal tort is thereby authorized. See § 37:2-5, New Jer. Stat. Ann. The largest classification of married women's acts simply confers upon a married woman the right to sue and be sued as a femme sole. See 4 Goodhue L. Rev. 475, and the classification there made of the various married women's acts, and see also the cases collected and annotated at 43 A. L. R. 2d 933. Within this group there is a wide variance between the states in interpreting the effect of this provision. For example, the statutory provision that "A woman may while married sue and be sued in the same manner as if she were unmarried" was held to authorize a suit by the wife against the husband for the use and occupation of her separate real estate, Skinner v. Skinner, 38 Neb. 756, 765, 57 N. W. 534, but not to authorize a suit for personal injuries, Emerson v. Western Seed & Irrigation Co., 126 Neb. 189, 216 N. W. 297. On the other hand, the statutory provision that a married woman "may * * * sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried," authorized her to sue her husband for personal tort, Gilman v. Gilman, N. Hamp., 95 A. 657. We shall not attempt the unrewarding task of attempting to reconcile the cases in the various jurisdictions, but we shall subsequently mention a few cases from other jurisdictions where married women's acts similar to those in this state have been construed in reference to the right of one spouse to sue the other for a personal tort.

The provision of the Missouri married Women's Act with which we are primarily concerned, now designated as § 451.290 (all statutory references are to R. S. Mo. 1949, V. A. M. S., unless otherwise stated), was originally enacted in 1889, and it has remained unchanged except for a minor amendment in 1939, which is not material to the issues presented in this case. This section provides: "A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party; * * *"

This statute is in derogation of the common law, and it unquestionably creates in married women new rights and it removes certain common law disabilities. We note that although it provides that a married woman may sue and be sued at law or in equity, it does not specifically provide that a wife may sue her husband or that a husband may sue his wife. On the other hand, it does not make any specific exception to the general and all inclusive language as to suits between husband and wife. Prior to the enactment of § 451.290 it was held that in some situations a wife could sue her husband in equity. Reiper v. Reiper, 79 Mo. 352. After its enactment it has been held that by reason of this statute a husband may sue his wife in equity, Abramsky v. Abramsky, 261 Mo. 117, 168 S. W. 1178; that either spouse may sue the other in replevin or conversion or for the willful or malicious destruction of the separate property of the plaintiff spouse, Shewalter v. Wood, Mo. App., 183 S. W. 1127; that either spouse may sue the other on contract, Rudd v. Rudd, 318 Mo. 935, 2 S. W. 2d 585; Cole v. Cole, 231 Mo. 236, 132 S. W. 7[illegible]; Rice-Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 398; Rega

Realty & Investment Co. v. Gallagher, Mo. Supp., 188 S. W. 151; Hall v. Greenwell, 231 Mo. App. 1093, 83 S. W. 2d 150; Montgomery v. Montgomery, 142 Mo. App. 481, 127 S. W. 118; that a wife may sue her husband in equity to recover her property, Hudson v. Wright, 204 Mo. 412, 103 S. W. 8; and that a wife may sue her husband for conversion of her property, Smith v. Smith, Mo. App., 300 S. W. 2d 275. It is apparent that the absence in this statute of specific authority for one spouse to sue the other has not deterred the courts from holding that in cases in equity, and in those involving property rights, even though the suit was one sounding in tort, the statute furnished the necessary authority to abrogate the common-law rule that such suits other than those in equity between spouses could not be maintained.

In 1915 there was first presented to this court the question of whether by reason of the married women's act one spouse could sue the other for a personal tort. In Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382, a married woman sought but was denied the right to maintain a suit for damages against her husband for an alleged false imprisonment. The court stated that what is now 451.290 "definitely declares the purposes for, and the extent to which * * * [a married woman] shall be deemed a femme sole," but it does not contain authority for a married woman to sue her husband for a personal tort. It was further stated that "it has never been held that he [the husband] may sue his wife for a personal tort" and what is now 451.290, and another statute now repealed, did "not attempt to confer greater rights of action upon a married woman than are possessed by her husband." Considerable reliance was placed on Peters v. Peters, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699, wherein it was held that a husband could not maintain an action against his wife for deliberately wounding him. An examination of the Peters case discloses that the California statute

relied on did not go any farther than as stated in the Rogers case, that is, "giving her the right to separate property and permitting her to contract with him," and that there was no provision, comparable to that in 451.290, that a married woman could sue or be sued at law or in equity as a feme sole. In the Rogers case it was concluded that although the married women's act of this state was "comprehensive * * * in effecting * * * [a married woman's] emancipation from matrimonial bonds so far as her property rights and the right to contract with others, and her husband is concerned, and to sue and be sued by him at law (Rice-Stix Co. v. Sally, 176 Mo., loc. cit. 128, 75 S. W. 398, and cases), and to sue alone in tort for injuries sustained by her through the negligence of others (Elliott v. Kansas City, 210 Mo. 576, 109 S. W. 627) there is no authority expressed or implied in the act given her to sue him for a personal tort." This ruling appears at first reading to be based strictly on an interpretation of the language of the statute, but as pointed out in Hamilton v. Fulkerson, Mo. Sup., 285 S. W. 2d 642, 644, "the reasons prompting the statutory construction there made rather than the possible and plausible contrary construction, were considerations of 'public policy.'" Whatever was the underlying basis for the result there reached, this construction of the Missouri married woman's act has been consistently followed. See Rice v. Gray, 225 Mo. App. 890, 34 S. W. 2d 567; Willott v. Willott, 333 Mo. 896, 62 S. W. 2d 1084, 89 A. L. R. 114; Rosenblum v. Rosenblum, 231 Mo. App. 276, 96 S. W. 2d 1082; Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S. W. 2d 645; Planck v. Planck, Mo. Sup., 190 S. W. 1183. We need not discuss these cases individually because they all purport to follow Rogers v. Rogers as being decisive of the question of whether one spouse was entitled to sue the other spouse for a personal tort committed during coverture.

It may be contended that Rogers v. Rogers does not pertain to the precise point here because there a wife

sought to sue her husband for a personal tort instead of the other way around. We see no justifiable reason to attempt to distinguish the cases on that basis. The authority contained in § 451.290 is not only to sue but to be sued at law or in equity as a femme sole. The problem we have here pertains to the right of one spouse to sue the other for personal tort committed during coverture whether the plaintiff-spouse be husband or wife. In determining this question consideration must be given not only to Rogers v. Rogers but also to two recent opinions of this court, which we shall now discuss.

In Hamilton v. Fulkerson, supra, the wife sought and was permitted to sue her husband for an antenuptial tort based on negligence in the operation of an automobile. The decision turned principally upon the interpretation of § 451.250 which, in its pertinent parts, is as follows: "All real estate and any personal property, including rights in action, belonging to any woman at her marriage or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall * * * be and remain her separate property and under her sole control, * * *." In the Hamilton case it was held that the language of this statute "seems broad and plain," and that "even if the common-law rule that marriage extinguished all rights of action and claims by one spouse against another, * * * should be, in the absence of specific statutory provision to the contrary, recognized and applied today in Missouri, Section 451.250 furnishes the necessary specific statutory authority for the abrogation of that rule as it might otherwise apply to the facts of * * * [that] case." No discussion was made, nor was it appropriate to do so under the facts, of the provisions in § 451.250 pertaining to a right of action by the wife "which may have come to her during coverture" and which "has grown out

of any violation of her personal rights." But the interpretation and application of § 451.250 which led to the result in Hamilton v. Fulkerson apparently would apply with equal force and effect to the factual situation where a wife sought to sue her husband on a cause of action for a personal tort which "came to her during coverture" and which arose "out of any violation of her personal rights." As we subsequently shall see, this court held in Ennis v. Trubitte, Mo. Sup., 306 S. W. 2d 549, that when a husband commits a personal tort against his wife a right of action does come into existence which can survive his death, and this necessarily presupposes a violation of her personal rights. Specific consideration was given in the Hamilton case to the question of public policy, and its effect on the right of the wife to maintain the suit against her husband, but it was held that "there are no matters of public policy" which would prohibit the maintenance of the suit under the specific facts of that case. Therefore, even if it was not intended by what is now § 451.290, as stated in Rogers v. Rogers, "to confer greater rights of action upon a married woman than are possessed by her husband," the Hamilton case holds that the Legislature did confer on the wife the right to sue her husband for an antenuptial personal tort whether the husband has the corresponding right or not. In addition, the inescapable result of the Hamilton case, by reason of its interpretation of § 451.250, necessarily must be that a wife may sue her husband for a personal tort which "came to her during coverture" and which arose "out of any violation of her personal rights," and that no public policy would prohibit the action because, as stated in the Hamilton case, this court by its decision in Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S. W. 2d 645, "recognized that there were no considerations of public policy weighty enough to prohibit a wife's suit against her husband for a personal tort committed during marriage."

In the Hamilton case it was pointed out that in Rogers v. Rogers no mention was made of or consideration given to what is now § 451.250, although it was then in effect as § 8309, R. S. Mo. 1909. We also note that in Willott v. Willott, supra, a case wherein a wife sought to sue her husband for injuries resulting from his negligent operation of an automobile, what was then § 3003, R. S. Mo. 1929, and is now § 451.250 deserved only the comment that "it so obviously relates alone to the separate property rights of a married woman that we do not set it out or intend to give it further notice. * * *." This comment is directly in conflict with the interpretation of this statute in Hamilton v. Fulkerson.

In Ennis v. Truhitte, supra, a woman was permitted to maintain an action against the estate of her deceased husband for a personal tort occurring during coverture. The opinion does not expressly state whether reliance was placed on § 451.250 or § 451.290, but it was stated that the married women's act, of which both sections are considered to be a part, does not either expressly deny or grant to a wife the right to sue her husband for a personal tort, but that "the terminology of the statutes is broad enough to permissively cover the matter." The important feature of this case in its application to the matter now before us is that the court expressly held that a personal tort by one spouse against the other during coverture does give rise to a cause of action. After commenting on the fact that it is sometimes stated "'that one spouse has no right of action against the other to recover damages for personal injuries caused by the other,'" it was stated that "it belies reality and fact to say that there is no tort when the husband either intentionally or negligently injures his wife." Of course, it would equally belie reality and fact to say that there is no tort when the wife either intentionally or negligently injures her husband. It was held in the Ennis case that "if there was a tort even though one

spouse could not maintain an action against the other for the wrong, the cause of action, as of course, accrued at the time of injury or when the damage 'is capable of ascertainment' * * * and so, * * * there was 'a cause of action in being to survive.'". It was concluded that the circumstances in the Ennis case did not "infringe on any reasons of policy," and because the married women's act does not "preclude the action" the suit could be maintained.

It necessarily follows that the holding of Rogers v. Rogers that "an action for a personal tort committed by a husband against a wife during coverture cannot be maintained under our statutes" was disapproved by the Ennis case insofar as it would preclude the maintenance of such an action against the estate of a deceased husband. Also, it is inescapable that the language in Rogers v. Rogers to the effect that in no event could a husband sue his wife for a personal tort is disapproved insofar as it could be construed to prevent a suit by a husband against the estate of his deceased wife for a personal tort committed during coverture.

We may briefly summarize the present situation as follows: Section 451.290 does not expressly state that one spouse may or may not sue the other for any purpose, but the courts have consistently held that this statute supplies the necessary statutory authority to abrogate the common law rule which prohibited suits between spouses, and that it authorizes a suit by one spouse against the other in equity, and at law on contracts, and for the protection of property even though the action is one sounding in tort. Ennis v. Truhitte holds that when one spouse negligently or intentionally injures the other a cause of action for that personal tort does come into existence, and that § 451.290 is "broad enough to permissively cover the matter" and it does not preclude the maintenance of a suit by one spouse against the other for a personal tort; the reasons prompting the construction of what is § 451.290 in Rogers

v. Rogers were that "the courts should construe the women's emancipation statutes in such a way as would avoid the possibility of disturbing domestic tranquility" (See Hamilton v. Fulkerson, supra, at p. 644); and Hamilton v. Fulkerson unquestionably purports to dispose of the "public policy question" by its assertion that this court, in Mullally v. Langenberg Bros. Grain Co., supra, "recognized that there were no considerations of public policy weighty enough to prohibit a wife's suit against her husband for a personal tort committed during marriage." Of course, if public policy does not prohibit a wife's suit for personal tort against her husband, it does not prohibit such a suit by the husband against the wife. We must necessarily conclude that in view of the inescapable implications arising from what was said and done in Hamilton v. Fulkerson and Engis v. Trubitte, this court has in effect already disapproved the result in Rogers v. Rogers. Therefore, the question we have is whether we should now directly disapprove it, or retract from the inescapable implications of these recent cases. This depends upon whether we agree that § 451.290 permits a suit for personal tort by one spouse against the other, and if so, whether there are any impelling reasons, notwithstanding such authorization, that public policy requires this court to deny the right of plaintiff in this case to sue his wife for a personal tort.

As to statutory construction: The language of § 451.290 is that a married woman shall be deemed a feme sole so far as to enable her to sue and be sued at law or in equity. This statute seems "to be as broad as plain words can make it." See Brown v. Gosser, Ky., 262 S. W. 2d 480, 43 A. L. R. 2d 626. The plaintiff in this case unquestionably would be entitled to maintain suit on his cause of action against the defendant if she were unmarried, that is, if she were a feme sole, and the Legislature has unequivocally said that the defendant, as a married woman, may be

sued as a feme sole. The broad and all inclusive language of the statute is not limited in any respect, and it does not directly or by inference provide that she may be sued by everyone except her husband. In Gilman v. Gilman, 78 New Hamp. 4, 95 A. 657, the court construed a statute that a married woman may "sue and be sued, in all matters in law and equity * * * as if she were unmarried," and it was there held: "If this language is given its ordinary meaning, she [wife] can maintain this action, providing she could maintain it if she were a single woman; for the statute provides in terms that, * * * she may sue and be sued in all matters as though she were unmarried. * * * Therefore the test to determine whether the plaintiff can maintain this action is to inquire whether she could maintain it if she were unmarried, and not to inquire who the defendant is, nor whether she is seeking to enforce a property right." This interpretation and reasoning applies equally as well when it is the husband who is the plaintiff as when it is the wife. There is nothing in § 451.290 to indicate that in determining whether a married woman may be sued the courts should inquire who the plaintiff is.

We also see nothing in the statute to indicate that the courts should inquire concerning the nature of the cause of action, that is, whether it is a suit on a contract, for a property tort, or for a personal tort. In Brandt v. Keller, 413 Ill. 503, 109 N. E. 2d 729, the court construed the provision of the Illinois married women's act (prior to its amendment which expressly prohibited suits between spouses for personal torts committed during coverture, see Chap. 68, § 1, Ill. Ann. Stat.), which provided in substance that a married woman could, in all cases sue and be sued without joining her husband, to the same extent as if she were unmarried. It was there held: "The statute cannot be construed to abrogate a husband's common-law immunity from suit by his wife for contract purposes, and be construed to perpetuate his immunity for

another purpose." By reason of the broad and unrestricted language used by the Legislature in § 451.290, it is inconsistent, and entirely without support in the language used to say it was intended that a married woman may sue her husband and be sued by him on a contract and for a property tort but not for a personal tort. We must and do reaffirm the holding of Ennis v. Truhitte that the married women's act does authorize or permit the maintenance of a suit for personal tort by one spouse against the other.

As to public policy: We previously noted that the construction in Rogers v. Rogers of what is now § 451.290 was based primarily upon considerations of public policy. The language of § 451.290 is comparable to that in the Kentucky statute which authorized a married woman "to sue and be sued as a single woman," and in Brown v. Gosser, supra, in commenting on that statutory provision and the public policy question, it was stated that "we still are faced with the elementary and, we think, unanswerable proposition that the Legislature has spoken on this subject. It has enunciated the public policy on this subject * * * by saying a married woman may sue and be sued as a single woman. It is not the function of the courts to enunciate a contrary policy." We cannot escape the conclusion, notwithstanding the result reached in Rogers v. Rogers, that our Legislature has also announced, without any limitation as to who may be plaintiff or defendant or as to the type of action or its purpose, that the public policy in this state is that a married woman may sue and be sued, and that it is not our function to enunciate a contrary policy even though we may not agree that the announced policy is the best. We agree with the statement of Justice Harlan in the dissenting opinion in Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 114, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921, that "it is not within the functions of the court to

ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly expressed will of the legislative department."

Assuming, however, that it may be contended that the authority contained in § 451.290 for one spouse to sue the other for any purpose, including a personal tort, is permissive only, and for that reason this court may declare that such suits as the one here presented should not be permitted as a matter of public policy, this court in Hamilton v. Fulkerson, has, in effect, already stated that there are no considerations of public policy weighty enough to prohibit a suit by one spouse against the other for a personal tort committed during marriage.

The reasons most frequently advanced in support of the argument that public policy should constitute a bar to suits by one spouse against the other for personal tort are that such suits would disturb or destroy marital harmony and domestic accord; cause fraudulent and collusive claims; encourage litigation; and promote trivial lawsuits. It is also frequently asserted that the right of one spouse to sue the other for personal tort is not needed because the divorce and criminal laws afford an adequate remedy. For a complete discussion of this "public policy argument" see Leach v. Leach, Ark., 280 S. W. 2d 15; Brandt v. Keller, supra; Brown v. Gosser, supra; Thompson v. Thompson, supra; Harper & James, Torts, § 8.10; Prosser on Torts, 2d ed., § 101; 43 Har. L. Rev. 1030, 1052; 1 Calif. L. Rev. 461, 471-480; 10 Ind. L. J. 290; 23 Mo. L. Rev. 103; and the cases collected and annotated in 44 A. L. R. 2d 632, 661-664.

This court in Hamilton v. Fulkerson discussed in considerable detail the various "public policy" arguments against the maintenance of a suit by one spouse against the other for an antenuptial tort. The same arguments pro and con apply equally to the maintenance of a suit by

one spouse against the other for a tort committed during coverture, and without burdening this opinion with a repetition of that discussion we find no impelling reasons why the conclusion of the Hamilton case on this question should now be disapproved. We are inclined to agree with the statement in Mertz v. Mertz, 271 N. Y. 466, 3 N. E. 2d 597, 601, 108 A. L. R. 1120, made in reference to the rule that public policy should prohibit a suit between spouses for a personal tort, that "the rule exists merely as a product of judicial interpretation, is vestigial in character, and embodies no tenable policy of morals or of social welfare. To argue that it survives because it is an aid to conjugal peace disregards reality. Conjugal peace would be as seriously jarred by an action for breach of contract, or on a promissory note, or for an injury to property, * * * all of which the law permits, as by one for personal injury."

There is no challenge to the petition other than that the parties are husband and wife. For the reasons above set forth, I am convinced that Rogers v. Rogers and the cases which have followed the result there reached should be overruled, and that the judgment dismissing the petition in this case should be reversed and the cause remanded for further proceedings.

Frank Hollingsworth,
Chief Justice.

APPENDIX B.

1.010. **Common Law in Force—Effect on Statutes.** The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the ~~United~~ States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.

1.090. **Words and Phrases, How Construed.** Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

451.250. **Married Woman to Hold Her Real and Personal Property as Her Separate Property—Liable for What.** 1. All real estate and any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband.

2. This section shall not affect the title of any husband to any personal property reduced to his possession with

the express assent of his wife; provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, encumber or otherwise dispose of the same for his own use and benefit, but such property shall be subject to execution for the payments of the debts of the wife contracted before or during marriage, and for any debt or liability of her husband created for necessaries for the wife or family; and any such married woman may, in her own name and without joining her husband, as a party plaintiff institute and maintain any action, in any of the courts of this state having jurisdiction, for the recovery of any such personal property, including rights in action, as aforesaid, with the same force and effect as if such married woman was a femme sole; provided, any judgment for costs in any such proceeding rendered against any such married woman, may be satisfied out of any separate property of such married woman subject to execution; provided, that before any such execution shall be levied upon any separate estate of a married woman, she shall have been made a party to the action, and all questions involved shall have been therein determined, and shall be recited in the judgment and the execution thereon.

451.290. **Wife Deemed Femme Sole, When.**—A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party; provided, a married woman may invoke all exemption and homestead laws now or hereafter in force for the protection of personal and real property owned by the head of a family, except in cases

where the husband has claimed such exemption and homestead rights for the protection of his own property.

537.040. **Married Woman Alone Liable for Her Torts.**—For all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefor, except in cases where, under the law, he would be jointly responsible with her if the marriage did not exist.

Constitution of Missouri (1945).

Section 14, Article I. **Open Courts—Certain Remedies—Justice Without Sale, Denial or Delay.**—That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

Section 1, Article II. **Three Departments of Government—Separation of Powers.**—The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Amendment 14 of the Constitution of the United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C.

In the Supreme Court of Missouri.

Division Number One.

September Session, 1959.

Frances Deatherage,

Appellant;

vs.

No. 46,917.

Henry Deatherage,

Respondent.

Appeal from the Circuit Court of Jackson County.

Honorable Richard C. Jensen, Judge.

Appellant, the plaintiff below, brought an action against her husband seeking $25,000 as damages for alleged personal injuries which she averred she sustained as a result of her husband's negligence, while they were husband and wife, in the operation of an automobile in which she was a passenger.

The trial court dismissed plaintiff's petition on the ground that the wife could not maintain an action against her husband for a personal tort committed during the marriage. Plaintiff has appealed from the judgment of dismissal.

The question presented on this appeal has been answered by the court en banc in Brawner v. Brawner, No. 46,319, ... S. W. 2d ....., decided on September 14, 1959. The question there was "whether a husband can maintain a civil action for damages against his wife for personal injuries resulting from negligent acts committed by the wife during the marriage." The court en banc, the chief justice dissenting, said:

"In the present state of the law, one spouse is not permitted to maintain this type of action against the other because of the common-law rule of immunity. Section 1.010, R. S. Mo. 1949. This is true notwithstanding the recent cases of Hamilton v. Fulkerson, Mo., 285 S. W. 2d 642, and Ennis v. Truhitte, Mo., 306 S. W. 2d 549, in which cases it was held that the rule did not apply because of the special circumstances of those cases. The Married Women's Act has been construed on several occasions as not authorizing actions for personal torts between spouses. It has not been demonstrated that this court is in a better position to interpret the legislative intent of these statutes than the courts that decided the Rogers case in 1915 and the Willott case in 1933. It may well be that this court would reach a different conclusion if it were construing similar statutes enacted in a modern day setting; but we are not at liberty to say that these prior decisions do not correctly interpret the legislative intent of 1889 * * * (..... S. W. 2d .....).

"Assuming, however, that this court is free to declare the public policy and change the rule in this kind of case, * * * (..... S. W. 2d .....).

"The common-law rule of spousal immunity from suit for a personal tort has been in existence during the entire period of Missouri statehood. It affects more than private rights, 26 Am. Jur. 633, Husband and Wife § 4, and should not be lightly disturbed. The appellant urges that the rule is so 'out of step with modern conditions' that it should be abrogated by the court. We refrain from doing so. If the public interest requires a change, we believe, for the reasons stated, that it should be made by the general assembly" (..... S. W. 2d .....).

The only difference in this and the Brawner case is that here a wife sought to maintain the personal tort action

against her husband, while in the Brawner case it was a husband against his wife. It is apparent from the portions of the opinion quoted above that the ruling of the Brawner case applies irrespective of which spouse is plaintiff. That case held that the "common-law rule of spousal immunity from suit for a personal tort" was and would remain the law of this state unless changed by the general assembly.

No reason is asserted by the instant appellant to support her contention that she may maintain this action which was not fully considered and ruled adversely to her by the court en banc in Brawner v. Brawner, supra.

The judgment is affirmed.

Cullen Coil, Commissioner.

Holman, C., Concurs.

Houser, C., Concurs.

Per Curiam: The foregoing opinion by Coil C., is adopted as the opinion of the court. All concur.